

Despite these conclusions, the Commission has expressed a desire to monitor roaming in order to take steps to support roaming if necessary.⁴⁸ AT&T believes that the Commission need not scrutinize roaming agreements, nor should it promulgate formal technical roaming standards. As the Commission recognizes, the cellular carriers themselves have developed and implemented the IS-41 roaming standard and the backbone network architecture necessary to provide ubiquitous, seamless roaming service.⁴⁹ The implementation of IS-41 demonstrates that government intervention is not necessary to promote the kind of national wireless infrastructure envisioned by the Commission.

If the Commission believes in the future that roaming should be mandated, it should not impose any standards other than “manual” roaming.⁵⁰ Mandating more complicated roaming arrangements would undermine a CMRS provider’s ability to implement a nationwide seamless roaming plan. There are several costs associated with government-mandated standards. For example, government entities might not have complete information about complex roaming requirements and might therefore choose the wrong standards. Government standards may also reduce the industry’s incentive to develop superior standards. As evidenced by the implementation of the IS-41 standard, CMRS providers already have incentives to provide for more complicated roaming arrangements. Complex roaming features have been and continue to be developed based largely on customer preference, need, and protection against cellular fraud. Further evolution of roaming standards would be

⁴⁸ Id. at ¶ 54.

⁴⁹ Id. at ¶ 55.

⁵⁰ Manual roaming is the least complex type of roaming available. Manual roaming does not incorporate advanced features such as fraud prevention or customer verification.

difficult for the Commission to anticipate. There is no need or justification for intervening in this ongoing process.⁵¹

III. Resale Obligations Should be Imposed Uniformly on All CMRS Providers

Congress's principal purpose in amending Section 332(c) of the Act was "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."⁵² Congress was aware that providers of what were, in fact, comparable services were subject to differing regulatory requirements, and sought to promote regulatory parity.⁵³ While Congress also recognized that differences among services and market conditions might warrant dissimilar regulation,⁵⁴ the clear thrust and intent of Congress was to avoid differential regulation of CMRS providers.

⁵¹ In connection with roaming issues, the Commission seeks comment on what type of subscriber database access is necessary to support roaming service. Second Notice at ¶ 59. CMRS providers do not need access to databases to support roaming at all unless they are providing seamless roaming. Seamless roaming enables customers to make and receive calls without taking any action other than turning on their mobile phones. Id. at ¶ 51 n.84. The Commission has not and should not require seamless roaming, but should let the marketplace determine which type of roaming is most efficient. Because database information is private and proprietary and should only be obtained when it is mutually beneficial for both CMRS providers, the Commission should therefore not require any subscriber database access to support roaming.

Finally, the Commission requests comment on the regulatory treatment of PCS subscribers who roam in cellular service areas. Id. at ¶ 57. Dual-band telephones will enable PCS customers to appear to cellular switches as if they were cellular customers. The Commission should not place restrictions on this type of roaming because PCS subscribers will obtain access to both PCS and cellular systems, and both PCS and cellular systems will benefit from the additional revenues obtained from cross-service roaming.

⁵² Conference Report at 490.

⁵³ House Report at 260. See also CMRS Second Report, 9 FCC Rcd at 1420.

⁵⁴ Conference Report at 491.

Consistent with these fundamental principles, any resale obligations that the Commission imposes on CMRS providers should be imposed uniformly on all CMRS providers. Thus, to the extent that resale is found to foster competition, the networks of all CMRS providers should be made available to competitors and new entrants in the mobile services marketplace. This should include PCS providers.⁵⁵ Any other policy would effectively thwart competition by imposing a significant regulatory burden on one class of CMRS providers to the benefit of their competitors.⁵⁶

Although parity should be the motivating principle behind the Commission's resale policy, the Commission should not impose a resale obligation where it would inhibit rather than advance competition. For example, the Commission should not extend the resale obligation to CMRS providers who cannot, due to the technical limitations of their services, resell CMRS. AT&T agrees that due to technical problems, air-to-ground providers should

⁵⁵ APC has proposed that PCS providers have no obligation to resell service to their facilities-based competitors. Second Notice at ¶ 88. AT&T believes that such inconsistent treatment of CMRS providers has no justification.

⁵⁶ The Commission should, of course, only extend the resale obligation to those services that are regulated pursuant to Title II of the Communications Act. For example, the Commission could not require CMRS providers to offer to resellers the same package of bundled service and CPE that they may offer to their high-volume customers, although the CMRS provider would still be required to offer the service component for resale. The Commission established in its Computer II decision that it would not treat CPE as a service, term and condition, or practice governed by all of the nondiscrimination requirements of Title II. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 (1980) ("Computer II"), modified on recon., 84 FCC 2d 50 (1980), further modified, 88 FCC 2d 512 (1981), aff'd sub nom., Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) ("CCIA"), cert. denied, 461 U.S. 938 (1983).

not be required to resell their services.⁵⁷ Specific rules for the resale of other services, such as paging, are also unnecessary given the vigorous facilities-based competition and ease of entry for such services. As a general matter, it is not clear why the Commission should devise any specific resale rules for competitive services when it could instead rely on the statutory prescription against discrimination to curb resale restrictions.⁵⁸

More fundamentally, the Commission also should reconsider its policy of requiring cellular licensees or any CMRS provider to resell capacity to facilities-based competitors that offer service within the former's service territory. A new provider of landline services may need to resell an incumbent's capacity in order to offer service with a geographic reach comparable to the incumbent's. The customers of a new entrant in the mobile services marketplace, by contrast, can obtain service outside the reach of the new entrant's facilities by "roaming" on an incumbent's system.

Continuing the five-year window for resale to facilities-based carriers -- particularly if the resale obligation is imposed only on cellular carriers -- would disserve the public interest in promoting competition. Facilities-based competitors eligible to resell the incumbent's capacity could and would delay construction of their own networks, possibly deciding to limit

⁵⁷ Air-to-ground telephone calls do not operate like cellular telephone calls. Each air-to-ground service provider must compete for limited channel capacity on a first-come, first-served basis. Moreover, each airplane can only carry a limited number of transceivers on board. An increase in the number of air-to-ground providers through resale would tie up spectrum, reduce trunking efficiencies, reduce channel availability, and result in longer waiting times for airline passengers to make air-to-ground calls.

⁵⁸ For instance, the Commission created a rule to require cellular carriers to resell their services. See 47 C.F.R. § 22.914. This rule is redundant of the cellular carriers' statutory duty not to discriminate unreasonably against similarly situated customers. See 47 U.S.C. § 202(a).

or abandon construction all together. This is likely to be particularly true for PCS licensees, whose build-out obligation is based on population rather than geographical coverage.⁵⁹

With a population-based build-out requirement, PCS licensees would have little incentive to construct facilities in rural or sparsely-populated areas; with the continued availability of resale capacity to serve those areas, they would have little need to do so. The Commission should therefore limit the facilities-based resale requirement to 18 months.⁶⁰

IV. The Commission Should Not Order Cellular Carriers to "Unbundle" Their Networks or Otherwise Provide Interconnection for Resellers' Switches

The Commission has tentatively concluded that CMRS providers should not have to unbundle their networks in order to offer switch-based resale to CMRS resellers.⁶¹ Given the proliferation of opportunities for entry into the CMRS marketplace, there is no merit to the resellers' proposal. Moreover, the resellers' switch proposal suffers from myriad technical and other difficulties. Because the resellers' proposal would impose significant costs on subscribers and carriers and creates price distortions that would subsidize resellers, the Commission has properly rejected it.

Mandatory interconnection or "unbundling" of CMRS networks is neither necessary nor desirable, regardless of whether the party seeking interconnection is a facilities-based

⁵⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd. 4957, 5018-19 (1994).

⁶⁰ The Commission also seeks comment on number portability issues. Second Notice at ¶ 94. While AT&T believes that number portability is important to sustain competition, it does not believe this is the proper proceeding in which to address it.

⁶¹ Id. at ¶ 95.

carrier or a reseller.⁶² The flaws in the resellers' switch proposals provide additional grounds for the Commission to reject mandatory unbundling. As a threshold matter, the resellers' switch proposals are wholly untested and raise significant technical problems.⁶³ In proceedings before this Commission⁶⁴ and the California Public Utilities Commission,⁶⁵ the resellers have provided no specific technical and engineering information to support their proposals, relying instead upon switch capabilities and software that have not yet been developed. While the resellers wish to offer service with all the features of cellular service, they have oversimplified and ignored significant operational problems and added costs that their proposal would cause to cellular carrier systems.⁶⁶ Cellular carriers should not be burdened with developing the sophisticated operational software to implement the resellers' switch proposal.

The reseller switch proposal is replete with problems, all of which would burden facilities-based carriers and their customers with significant costs:

- there are no signaling protocols such as IS-41 that can route all traffic cases to a resellers' switch to complete the call;

⁶² It would be anomalous for the Commission not to require interconnection for facilities-based CMRS providers but to require interconnection for resellers.

⁶³ In one variant of the resellers' switch proposal, the switch was to have been located between the mobile switching office ("MSO") and the local exchange carrier's network. In another variant, the switch would have been installed at the cell site.

⁶⁴ NCRA Petition for Reconsideration at 10; CSI/ComTech Petition for Reconsideration at 8-9.

⁶⁵ Supra, n.32.

⁶⁶ See Declaration of Roderick Nelson attached as Exhibit 3.

- 911 calls made by reseller switch subscribers would require special applications and back-up service by the MSO;
- under current IS-41 standards, vertical features such as call waiting, three-way calling, and call transfer can only be handled by the cellular MSO;
- the cellular switch cannot provide billing information to the reseller switch concerning the cell site from which the call originates;
- reseller switch malfunction will result in “hammering,” which would occur when end users “hammer” the network repeatedly with attempts to access the reseller switch; continuous access attempts would generate voice channel allocations and reduce the number of available voice channels for cellular customers;
- the reseller switch must be capable of protecting against fraud; and
- the resellers’ customers would be deprived of roaming capability unless the resellers enter independent roaming arrangements.

In addition to these problems, the resellers’ switch proposal would also result in considerable inefficiencies. For example, the proposal would impose lost trunking efficiencies between the cellular MSOs and switches, increased call set-up times due to carriers’ switches holding calls, and less efficient interconnection with the landline network, which would increase the per-call costs of termination. At best, the resellers’ switch proposal would duplicate functions performed by cellular systems (e.g., retention of collection of call detail information) without relieving cellular carriers of the obligation to perform these functions as well. At the same time, the addition of a reseller switch would degrade the quality of service made available to the resellers’ customers by forcing calls to be routed through an additional transmission link and deprive customers of existing roaming capabilities. The resellers have failed to provide any evidence that the addition of their

switches would provide subscribers with any services that they cannot already obtain from existing cellular carrier switches.

Additionally, the "unbundling" of the radio portion of cellular networks, as recently ordered in California, is unnecessary. Resellers and other new entrants have ready access to radio spectrum through their resale entitlement and through the Commission's recent decisions nearly to triple the amount of spectrum to be made available for commercial mobile services. With cellular radio channels and switching services already made available to resellers that compete at the retail level, the mandatory interconnection of resellers' switches is not required to promote retail competition.⁶⁷

The complaints by resellers regarding interconnection⁶⁸ are not sufficient to indicate that the market is not working or that consumers would be made better off by government intervention. As noted above, interconnection may be denied because it is inefficient, and a complaint may really be nothing more than an effort to obtain service at an artificially low price. In many cases in which a wholesale supplier offers service both through company-owned retail outlets and through independent dealers ("resellers"), complaints by the resellers are common. Their existence is not evidence of anticompetitive behavior.⁶⁹

⁶⁷ Owen Declaration at ¶ 109.

⁶⁸ As the Commission itself has reported, the "relatively few" complaints concerning cellular carriers' alleged denial of interconnection have all come from resellers asserting a right to interconnect their switches with cellular networks. CMRS Second Report, 9 FCC Rcd at 1499.

⁶⁹ Owen Declaration at ¶ 111.

CONCLUSION

The Commission has appropriately concluded that in the cases of interconnection, roaming, and resale, CMRS providers must be given sufficient latitude to compete against each other without the distorting influence of government regulation. Strategic alliances will foster competition and the proliferation of new services. For the foregoing reasons, the Commission should adopt its tentative conclusions to leave interconnection and roaming arrangements to the marketplace, and to require resale except where it is technically infeasible or contrary to competition.

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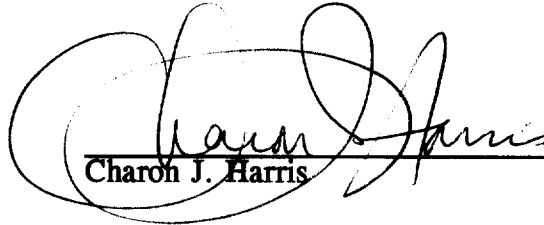
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Exhibit 1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of Interconnection and
Resale Obligations Pertaining to
Commercial Mobile Radio Services

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CC Docket No. 94-54

**Declaration of Bruce M. Owen in Response to the Second Notice of
Proposed Rule Making**

I. QUALIFICATIONS

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I am also a visiting professor of economics at Stanford University's Washington, D.C. campus. I hold a Ph.D. in economics from Stanford University (1970) and a B.A. in economics from Williams College (1965). My fields of specialization are applied microeconomics and industrial organization, especially antitrust economics and regulation of industry. I have published a number of books and articles in these fields, including "*United States v. AT&T: The Economic Issues*" (with Roger Noll, in Kwoka and White, eds., *The Antitrust Revolution*, 2nd ed., 1994), *Video Economics* (with Steven Wildman, 1992), and *The Regulation Game* (with Ronald Braeutigam, 1978). I have taught economics as a full-time member of the faculties of Duke University and Stanford University. From 1979 to 1981 I was the chief economist of the Antitrust Division of the United States Department of Justice. During 1971-1972 I was the chief economist of the White House Office of Telecommunications Policy. I have testified in a number of antitrust and regulatory proceedings,

including ones relating to local exchange, interexchange, and cellular telephony. See, for example, my declaration in "In the Matter of Telephone Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services," CC Docket No. 94-54 (RM-8012), Sept. 12, 1994; my five declarations in "In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services," GN Docket No. 93-252, Sept. 19, 1994; and my declaration in "In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates," PR Docket No. 94-105, Feb. 24, 1995. Each of these declarations was submitted on behalf of McCaw Cellular Communications, Inc. A copy of my curriculum vitae is attached to this declaration.

II. INTRODUCTION AND SUMMARY

2. I have been asked by counsel for AT&T Corp. to provide an economic analysis of several issues raised by the Federal Communications Commission (Commission) in its *Second Notice of Proposed Rule Making (Second NPRM)* (released April 20, 1995), including the likelihood of denial by cellular systems of efficient interconnections and roaming agreements¹ with other commercial mobile radio services (CMRS) providers, and of exclusionary action by facilities-based cellular providers against resellers. This section summarizes my conclusions. Section III provides a critique of the Commission's competitive analysis, which is based on a theory of raising rivals' costs. Section IV discusses the costs of mandatory interconnection. Section V discusses the definition of the relevant

¹ An interconnection, roaming arrangement, or standard is efficient if it would lower the cost to society of performing the service in question, or if it would add more to the value of services than it would add to costs.

markets in which CMRS providers compete. Section VI explains the policy positions adopted by the Department of Justice and the courts regarding mandatory interconnections among networks. Section VII examines roaming obligations. Section VIII addresses externality arguments for interconnection obligations and mandatory compatibility standards. Section IX analyzes resale obligations. Section X is a conclusion.

A. Interconnection

3. The Commission has correctly concluded that it should not adopt a rule requiring direct interconnections between CMRS providers (*Second NPRM* at ¶2). Earlier, the Commission correctly concluded that relevant markets are sufficiently competitive to justify forbearance from regulation of cellular and other CMRS providers (*CMRS Second Report*, 9 FCC Rcd 1411 (1994) at ¶¶135, 145). Now the Commission has restated this conclusion regarding competition (*Second NPRM* at ¶36) and further found that it would be premature to impose interconnection obligations on CMRS providers.
4. The Commission has provided a number of persuasive reasons why imposition of interconnection obligations would be premature. In the Commission's words, "in view of the nascency of many CMRS providers, and the rapidly developing technologies they may be employing, we cannot at this time make general conclusions about either the technical nature of CMRS-to-CMRS interconnection, the costs involved, or the nature of any rules that would best ensure its implementation" (*Id.* at ¶2). In addition, the Commission lacks evidence on the demand for communications among subscribers to different CMRS systems. Such evidence is necessary for an evaluation of the benefits of interconnection. Moreover, the alleged motivation for a CMRS provider to deny an efficient direct interconnection is to foreclose a competitor, and in many cases the Commission does not yet know which CMRS services will compete in a substantial way (*Id.*

at ¶29). Also, the Commission does not have evidence that CMRS carriers have unreasonably refused to interconnect (*Id.* at ¶37).

5. The Commission has raised a concern that cellular and other relatively large CMRS carriers may deny efficient direct interconnections with smaller CMRS providers in order to raise their smaller rivals' costs (*Second NPRM* at ¶32). Evidently the Commission considers that by increasing its smaller rivals' costs in this way, a relatively large CMRS provider would be able to take subscribers away from the smaller competitors, perhaps drive the latter out of business, and exercise market power by increasing its prices. Such a scheme is unlikely to make sense as a competitive strategy, or to succeed if it were attempted. The reasons are as follows.
6. *First*, the Commission has found that "CMRS providers do not have control over bottleneck facilities" (*CMRS Second Report* at ¶237). Since there are two cellular providers in any area, neither one of their systems could be an essential facility. Further, new CMRS systems do not need to interconnect directly with either cellular system because their landline local exchange carriers (LECs) already provide these interconnections. Not only do LECs provide an alternative but "it is often more efficient for CMRS providers to interconnect through the switching facilities of a local exchange carrier" (Declaration of Roderick Nelson, Vice President—Engineering, McCaw Cellular Communications, Inc., attached to *Comments of McCaw Cellular Communications, Inc.*, CC Docket No. 94-54 (RM-8012), Sept. 12, 1994 (Nelson Declaration), at ¶3).
7. *Second*, even if a CMRS provider did deny an efficient direct interconnection, the costs this could impose on another CMRS provider would be no more than the difference between the costs to the latter of using the indirect interconnection through the LEC and its costs for a direct interconnection (*Second NPRM* at ¶¶31-32). There is no evidence that this difference would be large enough to have a material effect on a provider that was denied an efficient interconnection.

Available evidence is inconsistent with a claim that direct CMRS-to-CMRS interconnections are necessary to enable a new provider to enter a market. It would therefore be difficult to demonstrate that a direct interconnection would become critical for the continued vitality of a competitor after it succeeded in developing a substantial volume of traffic.

8. *Third*, denial of an efficient direct interconnection would impose costs on the CMRS provider that denied the interconnection, because it would lose its share of the benefits of a direct interconnection.
9. *Fourth*, even if a relatively large CMRS provider were to impose costs on smaller rivals, this would not enable the larger CMRS provider to obtain market power in the market(s) in which it sells subscriptions and calls. For example, a cellular carrier would not be able to foreclose competition from the other cellular carrier and from the LEC, and it is hard to imagine that it could foreclose competition from broadband personal communications services (PCS) and enhanced specialized mobile radio (ESMR) services. Thus, each cellular carrier can be expected to have a market share well under 50 percent, and can be expected to face competitors that would be able to expand their output if a cellular carrier attempted to raise its prices. Under these circumstances, a cellular carrier could not expect to exercise market power even if managed to eliminate one or more smaller rivals. It follows that the Commission's raising rivals' costs theory cannot justify intervention to bring about CMRS-to-CMRS interconnections. All of the preceding points are explored in Section III.
10. It is likely to be inefficient from the point of view of society as a whole to mandate direct CMRS-to-CMRS interconnection for another reason. LECs presumably charge prices for interconnection services that exceed their marginal costs. As a result, there is an inefficient incentive for CMRS providers to by-pass the LEC switch by installing direct CMRS-to-CMRS interconnections, because decisions

to make such interconnections are based on prices charged by the LECs rather than the LEC's marginal costs. Commission intervention is at best unnecessary and is likely to result to interconnections for which the cost exceeds the marginal cost to the LEC of supplying the interconnection. (Section VIII)

11. Moreover, a rule mandating interconnection obligations for CMRS providers would impose significant costs on customers. It would inevitably result in direct interconnection in some situations in which the costs of interconnection would exceed the benefits. If a requirement to provide an inefficient interconnection would make the party requesting government intervention better off—for why else would that party request intervention?—then the requirement would necessarily raise the interconnection costs of the CMRS provider that was required to interconnect. Moreover, imposition of interconnection obligations would inevitably lead the Commission to regulate the prices for interconnection: nothing is achieved by mandating access without limiting the prices that can be charged for access. Mandatory interconnection and regulation of prices, which would inevitably be set below the efficient level in some cases, would limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions, and would deter new investments, quality improvements, new services, and entry by raising costs and reducing returns for pro-competitive activities. The distorting effects of price regulations that limit returns on investments are likely to be particularly great in industries such as CMRS that are characterized by rapid growth, technological change, and high risk. (Section IV)
12. Any examination of market power and competition must pay heed to the principles of market definition. The Commission in this proceeding attempts to define a relevant antitrust market for the "termination of calls originating from a CMRS competitor." There is no such antitrust market. The reason for defining relevant markets in this proceeding is to determine whether a CMRS provider could rea-

sonably expect that denial of an efficient interconnection with a competitor would enable it to gain significant market power. Application of standard principles of market definition to this issue leads to the conclusion that the most plausible relevant antitrust market is all CMRS services. (Section V)

13. The Commission would not be adopting an unusual policy in deciding not to require CMRS-to-CMRS interconnection. Issues of denial of access and interconnection arise with some frequency in antitrust cases, and it is widely-accepted doctrine that any general requirement of this sort would be very harmful to competition. Such requirements should be imposed only when extreme "essential facility" conditions exist. No such conditions are present here. (Section VI)

B. Roaming

14. The Commission is correct in concluding that it should not impose additional obligations on CMRS systems to provide roaming service, and in deciding not to regulate rates charged to end users for roaming services. Moreover, market conditions make it both unnecessary and potentially costly to consumers for the Commission to police the market to assure that CMRS providers are not denying roaming service in order to raise rivals' costs, and to assure that they are not charging unreasonable prices for roaming service. (Section VII)
15. Aside from anticompetitive behavior, the only problem that might in principle warrant mandatory interconnection and compatibility standards is the presence of a "positive externality." An example would be the existence of substantial benefits from a CMRS-to-CMRS interconnection that would accrue to parties *other* than the two CMRS systems that would interconnect and their customers. To justify government intervention, it would be not sufficient to demonstrate that the market is performing imperfectly. One must also demonstrate that government intervention would bring about a su-